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Nos. 04-805 and 04-814

In the Supreme Court of the United States

TEXACO, INC., PETITIONER

v.

FOUAD N. DAGHER, ET AL.

SHELL OIL COMPANY, PETITIONER

v.

FOUAD N. DAGHER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, when the joint venture's owners do not compete in the market for those products.

TABLE OF CONTENTS

Page

Statement 1
Discussion 7

A. The court of appeals misapplied the principles governing per se analysis under the Sherman Act 7

B. This Court should review and correct the court of appeals' error 17

Conclusion 20

TABLE OF AUTHORITIES

Cases:

Arizona v. *Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) 12, 13, 18

Blackburn v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995) 14

BMI, Inc. v. *CBS, Inc.*, 441 U.S. 1 (1979) 8, 10, 11, 12, 13, 18

Business Elecs. Corp. v. *Sharp Elecs. Corp.*, 485 U.S. 717 (1988) 7, 14

California v. *American Stores Co.*, 495 U.S. 271 (1990) 10

California Dental Ass'n v. *FCC*, 526 U.S. 756 (1999) 17

Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980) 19

Chevron Corp., In re, No. C-4023 (FTC Jan. 2, 2002) (*available at* <www.ftc.gov/os/2002/01/chevronorder.pdf>) 4

Cases—Continued: Page

Citizen Publ'g Co. v. *United States*, 394 U.S. 131 (1969) 13
Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) 7, 8, 13, 17, 18
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 10, 11, 12
Dr. Miles Med. Co. v. *John D. Park & Sons., Co.*, 220 U.S. 373 (1911) 11
FTC v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) 8
FTC v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) 19
General Leaseways, Inc. v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984) 15
Los Angeles Mem'l Coliseum Comm'n v. *NFL*, 726 F.2d 1381 (9th Cir. 1984) 14
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 18
New York v. *Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995) 10
NCAA v. *Board of Regents*, 468 U.S. 85 (1984) 12, 13
NFL v. *North Am. Soccer League*, 459 U.S. 1074 (1982) 15
Northern Pac. Ry. v. *United States*, 356 U.S. 1 (1958) 7
NYNEX Corp. v. *Discon, Inc.*, 525 U.S. 128 (1998) 18
Palmer v. *BRG of Ga., Inc.*, 498 U.S. 46 (1990) 19

Cases—Continued: Page

Polk Bros., Inc. v. *Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985) 15

Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987) 14, 15

SCFC ILC, Inc. v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995) 15

Shell Oil Co., In re, 125 F.T.C. 769 (1998) 3

State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 7, 19

Sullivan v. *NFL*, 34 F.3d 1091 (1st Cir. 1994), cert. denied, 513 U.S. 1190 (1995) 15

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 10, 13

United States v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899) 13, 14

United States v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) 15

United States v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972) 15

United States v. *Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), cert. denied, 125 S. Ct. 45 (2004) 14

Verizon Communications, Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) 18

Statutes: Page

Clayton Act § 7A, 15 U.S.C. 18a 3

Robinson-Patman Act, 15 U.S.C. 13 6

Sherman Act § 1, 15 U.S.C. 1 ..... *passim*

Miscellaneous:

7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) 11

Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775 (1965) 14

DOJ & FTC, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (Apr. 12, 2000) (*available at* <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>) 9, 16, 17, 18

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FTC, *Analysis to Aid Public Comment*:

62 Fed. Reg. 67,868 (1997) 9, 10

66 Fed. Reg. 48,143 (2001) 4

Herbert Hovenkamp, *Antitrust Law* (2d ed. 2005):

Vol. 11 18

Vol. 13 ..... 12, 18, 19

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, and the judgment below should be reversed.

STATEMENT

Petitioners Shell Oil Co. (Shell) and Texaco, Inc. (Texaco) formed two joint ventures to refine and market gasoline products within the United States. Respondents, a class of 23,000 gas station owners in the western United States, brought a suit alleging that Shell and Texaco violated the antitrust laws by agreeing that the joint venture operating within respondents' geographic region would unify the pricing of the Shell and Texaco brands of gasoline.

Respondents contended that the agreement constituted a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court rejected that theory of liability and granted summary judgment in favor of petitioners, but the court of appeals, in a divided decision, reversed. See Texaco Pet. 2-5; Shell Pet. 2-7; Pet. App. 1a-33a, 46a-69a.[1]

1. Petitioners were once "fierce competitors" in all aspects of the oil and gasoline markets. Pet. App. 3a. In 1998, however, they formed a "nationwide alliance" through two wholly-owned joint ventures that encompassed their "downstream" operations relating to the refining and sale of gasoline in the United States. *Id.* at 3a-4a. The two joint ventures, named Motiva Enterprises and Equilon Enterprises, each assumed responsibility for refining, transporting, and marketing Shell and Texaco gasoline products in distinct geographic regions. *Ibid.* Petitioners transferred all of their domestic downstream assets to those joint ventures and ceased competing separately in the downstream U.S. markets. *Id.* at 5a, 37a; Texaco Pet. 3; Shell Pet. 3-4.[2]

The dispute before this Court involves Equilon, which petitioners formed to own and operate their downstream assets in the western United States. Pet. App. 4a.[3] Petition-

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[1] "Texaco Pet." and "Shell Pet." refer, respectively, to the petitions for writ of certiorari in No. 04-805 and No. 04-814. "Pet. App." refers to the petition appendix in No. 04-805.

[2] The transfers of assets and personnel included "twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees." Pet. App. 4a n.3.

[3] Petitioners (together with a third joint-venture partner) formed Motiva to operate their downstream assets in the eastern United States. Pet. App. 3a-4a. The district court granted petitioners summary judgment on all claims related to Motiva because respondents had never purchased gasoline from Motiva. *Id.* at 34a-45a. The court of appeals affirmed on that point. *Id.* at 10a-12a.

ers' formation of Equilon was not subject to statutory reporting requirements, see 15 U.S.C. 18a, but the Federal Trade Commission (FTC) and four western state attorneys general investigated the transaction. Pet. App. 5a. The FTC issued a complaint alleging that the combination, as originally proposed, would harm competition in seven distinct markets. *In re Shell Oil Co.*, 125 F.T.C. 769, 769-777 (1998). The FTC and petitioners entered into a consent agreement that mandated divestiture of certain assets and related relief to prevent such harm, but did not impose any restrictions on pricing decisions respecting the joint venture's sale of Shell and Texaco products. See *id.* at 778-811.

Under the terms of the consummated joint venture, petitioners granted Equilon an exclusive license to sell gasoline under their brand names in the western United States, and they agreed to split Equilon's profits (or losses) in a fixed ratio based on the assets each contributed to the joint venture. Pet. App. 5a. Thus, each petitioner's returns were determined by Equilon's total profits and not by the relative sales of Shell-branded or Texaco-branded gasoline. The joint venture had an initial term of 20 years, but was terminable by mutual consent at any time, or unilaterally after five years (upon two years' notice). *Ibid.*[4]

At some point, "a decision was made" that Equilon would sell Shell-branded and Texaco-branded gasoline at the "same price in the same market areas," leaving to Equilon the determination of that price. Pet. App. 6a. Although the pricing of the two gasoline brands was unified, Texaco and Shell maintained each brand as a distinct product with "its own unique chemical composition (the gasoline

[4] The district court recognized that, in light of petitioners' extensive financial commitments and operational integration, the mere existence of such termination provisions did not call into question the joint venture's legality. Pet. App. 58a-60a.

is differentiated by separate packages of 'additives'), trademark, and marketing strategy." *Id.* at 6a-7a.

Petitioners continued to compete with each other in their domestic "upstream" operations (*e.g.*, exploring and producing crude oil), in their foreign operations, and in operations unrelated to refining and marketing gasoline (*e.g.*, their chemical, aviation fuels, and marine fuels businesses). See Pet. App. 5a, 56a. In addition, each company "retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand." *Id.* at 5a; see *id.* at 58a.[5]

2. The district court granted petitioners summary judgment, holding in relevant part that respondents "have failed to raise a triable issue of material fact" on whether petitioners have engaged in per se unlawful "price fixing." Pet. App. 68a. The court noted that respondents had "eschewed an exhaustive rule of reason analysis" and instead asserted liability only "under the per se or quick look doctrines." *Ibid.*; see *id.* at 7a, 47a. The district court accordingly found no need to engage in a rule of reason inquiry in resolving the issues before it. See *id.* at 68a.

The district court rejected respondents' contentions that an agreement between Shell and Texaco to unify Equilon's pricing for Shell-branded and Texaco-branded gasoline in each local area would constitute per se unlawful

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[5] Shell has since bought out Texaco's interest in Equilon, in accordance with the conditions that the FTC imposed on the 2002 combination of Texaco and Chevron. See *In re Chevron Corp.*, No. C-4023 (FTC Jan. 2, 2002) (*available at* <www.ftc.gov/os/2002/01/chevronorder.pdf>). The FTC pointed out at that time that "[a]ll assets in each portion of the Alliance already are under common ownership and control, and divestiture of these interests to Shell * * * would closely maintain the situation that currently exists." FTC, *Analysis to Aid Public Comment*, 66 Fed. Reg. 48,136, 48,143 (Sept. 18, 2001).

horizontal price fixing in violation of Section 1 of the Sherman Act. Pet. App. 52a-54a. The court observed that "every * * * joint venture must, at some point, set prices for the products they sell." *Id.* at 53a. Respondents' theory, the court explained, would essentially "act as a per se rule against joint ventures between companies that produce competing products." *Id.* at 54a.

3. A divided panel of the Ninth Circuit reversed the district court's grant of summary judgment. Pet. App. 1a-33a. The court of appeals remanded for further proceedings to determine whether Shell and Texaco had committed a per se violation of the Sherman Act by agreeing that Equilon would charge identical prices for the two gasoline brands. *Id.* at 21a-23a, 27a-28a.

The court of appeals viewed the case as presenting the question whether the courts should "find an exception to the *per se* prohibition on price-fixing where two entities have established a joint venture that unifies their production and marketing functions, yet continue to sell their formerly competitive products as distinct brands." Pet. App. 12a-13a.[6] The court acknowledged that Equilon was a "legitimate," efficiency-enhancing joint venture. *Id.* at 4a-5a,

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[6] The court assumed that Shell and Texaco reached an agreement to unify prices at the formation of their alliance. See Pet. App. 13a ("the companies fixed the prices * * * by agreeing *ex ante* to charge the exact same price for each"); *id.* at 19a n.11 ("there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands"). See also *id.* at 6a (the "decision to charge the same price for the two distinct brands 'was developed as sort of an operating requirement right from the very start or near to the very start of the alliance'"); *id.* at 22a (petitioners "*unified* the pricing of the two brands from the time the alliance was formed"). Neither the panel majority nor respondents have suggested that the agreement to unify prices—regardless of its timing—affected or applied to the prices of gasoline or other products sold by Texaco or Shell rather than by Equilon or Motiva.

9a. The court viewed the pricing agreement, however, as one subject to the ancillary restraints doctrine and concluded that the agreement to unify prices was a "naked" restraint, *id.* at 16a-17a, in the absence of a showing that it was "reasonably necessary to further the legitimate aims of the joint venture," *id.* at 21a.

The court of appeals rejected petitioners' proffered justification for the agreement—that it was intended to avoid potential suits for price discrimination under the Robinson-Patman Act, 15 U.S.C. 13—on the grounds that that Act was "unquestionably * * * inapplicable." Pet. App. 25a. The court also rejected petitioners' argument that application of the per se rule would interfere with the ability of joint ventures to set prices for their products. *Id.* at 26a-27a. In the court's view, the "question is whether two former (and potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands." *Ibid.* The per se rule applies, the court asserted, "when the defendant fails to demonstrate a sufficient relationship between the price fixing scheme and furthering the legitimate aims of the joint venture—a relationship that justifies the otherwise prohibited price restraints." *Id.* at 27a. "Thus far," the court concluded, petitioners had failed to produce evidence "demonstrating that their price fixing scheme was ancillary rather than naked." *Ibid.*

Judge Fernandez dissented. Pet. App. 28a-33a. He observed that Equilon, rather than petitioners, competed in the business of refining, transporting, and marketing gasoline in the western United States. *Ibid.* Equilon "ran the refinery; it had the research facilities; it transported products; and it dealt with the station operators and other buyers. It also priced the products, and set the same price for *its* Shell and Texaco brands." *Id.* at 29a. In his view,

"nothing more radical is afoot than the fact that an entity * * * prices its own products." *Id.* at 31a-32a.

DISCUSSION

The court of appeals' decision mistakenly holds that an agreement between the owners of a lawful joint venture respecting the pricing of their joint venture's products may constitute a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The court's error is serious, it upsets the previously settled understanding of the scope of per se liability and the lawful operation of joint ventures, and it warrants this Court's review and correction.

A. The Court Of Appeals Misapplied The Principles Governing Per Se Analysis Under The Sherman Act

1. This Court has properly construed the Sherman Act to confine the role of per se rules in identifying anticompetitive activity. "Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' this Court has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997). The rule of reason is the "prevailing standard of analysis," and any departure from that standard "must be based upon demonstrable economic effect rather than * * * upon formalistic line drawing." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49, 58-59 (1977). See *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) ("there is a presumption in favor of a rule-of-reason standard").

Departures from rule of reason analysis are limited to those "restraints * * * hav[ing] such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." *Khan*, 522 U.S. at 10 (citing *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958)). Per se rules—which

obviate the need to prove that the challenged conduct unreasonably restrains competition—are "appropriate only when they relate to conduct that is manifestly anticompetitive." *GTE Sylvania*, 433 U.S. at 49-50. See, *e.g*, *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986) (expressing reluctance to adopt per se rules with regard to "restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious").

2. The court of appeals plainly erred in concluding that an agreement between petitioners to unify Equilon's pricing for its Texaco-branded and Shell-branded gasoline could result in a per se violation of Section 1 of the Sherman Act. The court of appeals did not question that Shell and Texaco lawfully could form Equilon to combine their "downstream" operations in the western United States into a single entity that would refine and market their gasoline products. The court nevertheless concluded that those companies could face per se condemnation for additionally agreeing that the newly formed entity would employ a unified pricing mechanism for the two gasoline brands under its control.[7]

The court of appeals' conclusion fails to come to grips with a fundamental feature of the joint venture. As that court and respondents have recognized, Equilon's *formation* eliminated all competition between Shell and Texaco with respect to the refining and sale of gasoline in the western United States. See Pet. App. 5a; Br. in Opp. 5. Upon

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[7] The court of appeals' pejorative description of the agreement as "price fixing" (Pet. App. 16a) does not resolve whether per se treatment is appropriate. This Court has recognized that "price fixing" is illegal per se, but that "easy labels do not always supply ready answers." *BMI, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 8 (1979). As in *BMI*, the conduct here is not "price fixing" as that term is "generally used in the antitrust field." *Id.* at 9.

forming Equilon, each petitioner ceased its separate participation in the relevant domestic downstream markets. Pet. App. 5a; Texaco Pet. 3; Shell Pet. 3. The FTC, when it reviewed the creation of the joint venture, thus treated Equilon's formation as a merger of downstream operations. See FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). It accordingly applied the antitrust enforcement standards that the Justice Department and the FTC each apply to such mergers and evaluated the joint venture in essentially the same way it would have analyzed the complete merger of Shell and Texaco if they had no operations other than downstream operations.[8]

Section 1 of the Sherman Act unquestionably applies to an agreement between competitors to form a joint venture

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[8] See DOJ & FTC, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) (*Competitor Collaboration Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (Apr. 12, 2000) (*available at* <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>). Section 1.3 of the *Competitor Collaboration Guidelines* spells out the conditions under which a competitor collaboration "ordinarily" should be treated as a horizontal merger and analyzed under the agencies' *Horizontal Merger Guidelines* (*reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 2, 1992, rev. Apr. 8, 1997) (*available at* <http://www.usdoj.gov/atr/public/ guidelines/hmg.pdf>)):

> (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period [ordinarily, ten years] by its own specific and express terms.

Competitor Collaboration Guidelines § 1.3 (footnotes omitted). See *id*. App. Example 1 (merger analysis should apply when "[t]wo oil companies agree to integrate all of their refining and refined product marketing operations"). Equilon satisfies all four of those criteria. See pp. 2-3, *supra*. See also 13 Herbert Hovenkamp, *Antitrust Law* ¶ 2121, at 17-129 (2d ed. 2005) (describing when production joint ventures should be treated as mergers); *id*. ¶ 2123, at 147.

that eliminates competition between them.[9] The agreement may be unlawful per se if it does not involve an efficiency-enhancing integration of economic activity. *E.g.*, *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597-598 (1951). But per se analysis is not appropriate if the joint venture involves efficiency-enhancing integration. The FTC thoroughly reviewed petitioners' alliance, and both courts below agreed that Equilon was an efficiency-enhancing venture. Pet. App. 4a-5a, 9a, 50a. There is no basis for serious suggestion in this case that the formation of Equilon was a mere sham designed to mask cartel conduct.[10]

It is well settled that the formation of an efficiency-enhancing joint venture is "judged under a rule of reason" because it "hold[s] the promise of increasing a firm's efficiency and enabling it to compete more effectively," *Copperweld Corp.* v. *Independence Tube Co.*, 467 U.S. 752, 768

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[9] Texaco argues that Section 1 does not apply to the conduct alleged in this case because respondents in fact challenge the pricing decisions of the joint venture, not a pricing agreement between petitioners. Texaco Pet. 10-13, 18-22; see also Shell Pet. 15-16. That issue is not present at this stage of the proceedings, however, because the court of appeals' decision rests on the disputed factual premise that the decision to unify pricing was made by petitioners at or before the joint venture's formation. Pet. App. 19a & n.11; see also note 6, *supra*. Texaco concedes that "the decision of two companies to form a joint venture is a 'merging of resources' to which Section 1 applies." Texaco Pet. 18 (quoting *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984)).

[10] See FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). Although a government consent decree provides powerful evidence of the lawfulness of a merger or joint venture, see *BMI, Inc.*, 441 U.S. at 13, 16, Texaco and petitioners' amici are wrong to suggest (Texaco Pet. 20; Antitrust Scholars *Amicus* Br. 12-15) that the FTC's prior review of Equilon's formation placed that transaction beyond judicial review. See, *e.g.*, *California* v. *American Stores Co.*, 495 U.S. 271 (1990) (California successfully challenged supermarket merger despite FTC's review of the transaction); *New York* v. *Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995).

(1984). See also 7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478, at 318 (2d ed. 2003) (a "venture's formation results from the founders' 'agreement,' which, like any other formation agreement, can be appraised for 'reasonableness' under Sherman Act § 1"). There is no reason to apply per se analysis, rather than the rule of reason, to a single aspect of the joint venture arrangement—here, the unified pricing of gasoline brands—that merely reflected, but did not cause, the elimination of competition.

Equilon's formation eliminated *all* price and non-price competition, in any sense relevant to Section 1, between the two brands of gasoline in the western United States. That fact remained true, regardless of how Equilon (or petitioners as Equilon's owners) priced the two brands. A remedial order compelling Equilon to price the brands independently would not create meaningful competition between the brands. Competition between brands under the exclusive control of a unitary company is not competition with which Section 1 is concerned. See *Copperweld*, 467 U.S. at 771 (rejecting intra-enterprise conspiracy doctrine). The court of appeals did not identify any other competition threatened by the pricing agreement.[11]

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[11] Because the joint venture was not a supplier of inputs to the venture participants, the venture could not have been facilitating a cartel in the gasoline markets by artificially inflating the venture participants' input costs. And because the two companies did not have a vertical relationship in the domestic downstream markets—neither sold gasoline or pipeline services to the other—they could not have entered into a per se unlawful vertical price fixing agreement. Cf. *Dr. Miles Med. Co.* v. *John D. Park & Sons., Co.*, 220 U.S. 373 (1911). Texaco and Shell did continue to compete outside their joint ventures' spheres. Pet. App. 56a; Shell Pet. 3. Respondents, however, have not argued that the agreement to unify Equilon's prices of Texaco-branded and Shell-branded gasoline affected competition in those other markets, *e.g.*, by manipulating the value of the companies' trademarks. See *BMI*, 441 U.S. at 23-24 (distinguishing situation in which competing copyright holders "use the

Per se treatment would be inappropriate even if, contrary to the court of appeals' premise, petitioners' agreement to unify the pricing of the two brands occurred *after* Equilon became operational. Texaco and Shell were not independent participants in the downstream markets at that point and therefore were incapable of forming a horizontal agreement—*i.e.*, "an agreement among competitors on the way in which they will compete with one another," *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984)—with respect to operations in those markets. Rather, petitioners would have been acting solely in their capacity as owners of a marketplace participant. See *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) ("partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit" are "regarded as a single firm competing with other sellers in the market"). This Court's decision in *Copperweld* would preclude any application of Section 1 in that context. See 467 U.S. at 771.

Application of the per se rule would also be inconsistent with *BMI, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979). In *BMI*, this Court rejected the argument that participants in a legitimate joint venture engage in price fixing subject to the per se rule when they set the price at which the venture sells its products to third parties. The Court noted that such a practice cannot be categorically described as "'plainly anticompetitive' and very likely without 'redeeming virtue.'" 441 U.S. at 9. As the Court observed, "[w]hen two partners set the price of their goods or services they are literally

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blanket license to mask price fixing in such other markets"). Cf. 13 Hovenkamp, *supra*, ¶ 2122, at 132 (a joint venture may pose a threat to competition if it "eliminat[es] the competition that exists between the joint venture participants outside the venture. This might happen if the joint venture becomes an excuse for price fixing with respect to the venturers' non-venture business.").

'price fixing,' but they are not *per se* in violation of the Sherman Act." *Ibid.*

In sum, because the alleged agreement to unify the pricing of Texaco-branded and Shell-branded gasoline did not eliminate competition, there is no basis for adjudging it as "manifestly anticompetitive" and subject to per se condemnation. See *GTE Sylvania*, 544 U.S. at 49-50.[12]

3. The court of appeals compounded its error by applying the ancillary restraints doctrine to this case. The court proceeded from its premise that the agreement to unify prices constituted unlawful "price fixing" to conclude that petitioners could avoid per se condemnation only by showing that the agreement was "ancillary" to and "reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 15a-18a, 21a; see *id.* at 22a & n.14, 27a. The court erred fundamentally by applying that test to an agreement between owners of a legitimate joint venture with respect to the prices at which the venture sells products in markets in which the owners do not separately compete.

Judge Taft's decision in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899), which recognized that certain consensual restraints may ultimately facilitate competition, introduced

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[12] The decisions on which the court of appeals and respondents rely are easily distinguishable. See *Citizen Publ'g Co.* v. *United States*, 394 U.S. 131, 133-134 (1969) (agreement fixed prices and pooled profits for defendants' separately owned and produced news and editorial content); *NCAA*, 468 U.S. at 114-115 & n.54 (rule of reason applied to agreement restricting individual members' non-venture output of television broadcasts); *Maricopa*, 457 U.S. at 356-357 (doctors' joint venture lacked pooling of capital or sharing of risks and was merely an agreement among "independent competing entrepreneurs" "concerning the price at which each will offer his own services to a substantial number of consumers"); *Timken*, 341 U.S. at 597-598 (joint venture did not involve any efficiency-enhancing integration).

the ancillary restraints doctrine into antitrust law. That doctrine "teaches that some agreements which restrain competition may be valid if they are 'subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.'" *Los Angeles Mem'l Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984) (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 797-798 (1965)), cert. denied, 469 U.S. 990 (1994).[13]

Since Judge Taft's first articulation of the ancillary restraints doctrine in *Addyston Pipe*, 85 F. at 280, courts invoking the doctrine have required joint venture partners to demonstrate the reasonable necessity of restrictions on their own conduct outside the venture. For example, charge card joint ventures must demonstrate the reasonable necessity of an agreement that members not issue certain competing cards. See *United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003), cert. denied, 125 S. Ct. 45 (2004). Lawyers dissolving their partnership must demonstrate the reasonable necessity of agreed-upon territorial restrictions on advertising by the former partners. See *Blackburn* v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995). And truck leasing companies agreeing to provide service for each others' trucks must demonstrate the reasonable necessity of adopting territorial restrictions on leasing competi-

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[13] "To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.), cert. denied, 479 U.S. 1033 (1987). "The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market." *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 729 n.3 (1988).

tion. See *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984).[14]

As the foregoing cases demonstrate, the courts have regularly applied the ancillary restraints doctrine to agreements respecting joint venture participants' conduct outside of the joint venture. Some courts have also applied the doctrine to restraints on admission to joint venture membership.[15] But so far as the United States is aware, the court of appeals' decision in this case is the first ruling to apply the ancillary restraints doctrine to constraints on the joint venture's *own* conduct. In any event, as noted, the joint venture's own conduct within its legitimate scope does not affect competition in the Section 1 sense. The court of appeals' error here is particularly striking because the agreement that the court separated out from the venture for per se analysis is so clearly integral to that venture and unrelated to the independent conduct of the owners.[16]

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[14] See also *NFL* v. *North Am. Soccer League*, 459 U.S. 1074, 1077-1078 (1982) (Rehnquist, J., dissenting from denial of certiorari) (applying ancillary restraints doctrine to a sports league's restraint on members' ownership of other sports teams); *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 613 (1972) (Burger, C.J., dissenting) (applying ancillary restraints doctrine to a restraint on the territories in which a joint venture's members could sell the products supplied to them by the venture); *Polk Bros., Inc.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 188-190 (7th Cir. 1985) (applying ancillary restraints doctrine to limitation on which products joint venturers could sell in their adjacent retail stores); *Rothery Storage & Van Co.*, 792 F.2d at 223-230 (applying ancillary restraints doctrine to prohibition against moving company's agents using joint venture property for non-venture business).

[15] See, *e.g.*, *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 968 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995); *Sullivan* v. *NFL*, 34 F.3d 1091, 1102-1103 (1st Cir. 1994), cert. denied, 513 U.S. 1190 (1995); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1374-1387 (5th Cir. 1980).

[16] The court of appeals' hypothetical example of two soft drink companies entering into a joint research venture accompanied by a price-fixing agreement highlights the distinction. See Pet. App. 16a. The companies' agreement to fix

The ancillary restraints doctrine can serve an important role in distinguishing legitimate cooperative activity from sham undertakings designed to disguise "an old-fashioned price fixing cartel." Pet. App. 50a. The federal enforcement agencies, in turn, apply the per se rule to naked restraints, and the Department of Justice may prosecute them criminally. *Competitor Collaboration Guidelines* § 3.2. But there is no justification for invoking the ancillary restraints doctrine in this case. Here, the owners of a concededly efficiency-enhancing joint venture allegedly agreed to unify the pricing of separately branded products that the joint venture was formed to produce and sell. The agreement governed only the conduct of the joint venture; it did not restrain competition by the joint venturers outside the joint venture, and it applied only to those markets from which the venturers entirely exited as part of the venture's formation. The agreement was not *collateral* to the joint venture but instead addressed an integral aspect of the venture's operation, namely, the pricing of its own products. The ancillary restraints doctrine simply has no role to play in this case.

The court of appeals thus erred in concluding that the facts here might justify per se condemnation. Because respondents "disclaimed any reliance on the traditional 'rule of reason' test" (Pet. App. 7a), the failure of respondents' per se theory necessitates reversal.[17]

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the price at which *they* independently sell their products has no apparent relationship to the joint research venture and is therefore categorically different from the agreement at issue here, which related solely to the price at which the *joint venture* would sell *its* products.

[17] The court of appeals noted that respondents also asserted a "quick look" theory, Pet. App. 7a, but it declined to reach that theory of liability, *id.* at 13a n.7. Quick look analysis, however, is available only when "an observer with even a rudimentary understanding of economics could conclude that the

B. This Court Should Review And Correct The Court Of Appeals' Error

1. The issue presented by the petitions is narrow but important. The decision below chills legitimate and beneficial economic activity by raising the specter of per se liability for efficiency-enhancing joint ventures that unite formerly competing products under common ownership and pricing control. More generally, the court of appeals' improper expansion of per se liability to encompass agreements that are not clearly anticompetitive potentially undercuts the per se rule's value in discouraging unlawful conduct and facilitating effective enforcement of the antitrust laws. Per se rules establish bright-line tests that identify obviously pernicious conduct, powerfully deterring plainly unlawful behavior and providing clear guidance to businessmen and antitrust counselors. The court of appeals' decision both blurs the bright line and sweeps too broadly, erroneously extending per se condemnation to a class of agreements that cannot be fairly described as "manifestly anticompetitive," *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977).

The court of appeals' expansion of the scope of the per se rule to conduct that is not manifestly anticompetitive casts a shadow over the critical decisions of numerous businesses to the detriment of the national economy. In particular, production joint ventures, such as Equilon, are increasingly common and often have substantial procompetitive potential. See *Competitor Collaboration Guidelines*

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arrangements in question have an anticompetitive effect on customers and markets." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 770 (1999); see *ibid.* (quick look applies "when the great likelihood of anticompetitive effects can easily be ascertained"). Respondents have offered no economic theory that would justify such an approach to the pricing of Equilon's products in this case.

Preamble; *id.* § 2.1; 13 Hovenkamp, *supra*, ¶ 2121, at 125-127. The prospect of per se condemnation—and the accompanying risk of treble-damages liability—for conduct integral to the operation of such a venture, such as pricing the products it sells, would no doubt encourage unsound private antitrust suits and correspondingly chill procompetitive conduct.[18] The adverse consequences of false condemnations are particularly severe if plaintiffs can invoke a per se rule and avoid any obligation to prove that the specific conduct unreasonably restrained competition.[19]

The per se rule plays a critical role in effective antitrust enforcement by streamlining litigation involving the practices that most seriously threaten competition. See *Maricopa County Med. Soc'y*, 457 U.S. at 344; *BMI, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 8 n.11 (1979); *GTE Sylvania*, 433 U.S. at 50 n.16. In particular, effective criminal prosecution of hard-core cartel conduct—such as horizontal price fixing, bid rigging, and market allocation—would be immensely more difficult if defendants were permitted to complicate jury trials

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[18] Pricing decisions are a core function of any production joint venture. See 11 Hovenkamp, *supra*, ¶ 1908, at 263-264 ("agreements about price are often essential to the administration of certain joint ventures, particularly in distribution"); 13 Hovenkamp, *supra*, ¶ 2132, at 180 ("joint setting of a price may often be necessary in cases of joint ownership of the good or service being sold"). All of the circumstances surrounding Equilon's formation reinforce the general principle that the rule of reason, rather than the per se rule, should apply. See pp. 7-13, *supra*; see also *GTE Sylvania*, 433 U.S. at 59 ("[w]hen anticompetitive effects are shown to result from particular [] restrictions they can be adequately policed under the rule of reason").

[19] Cf. *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("false condemnations 'are especially costly, because they chill' " procompetitive conduct) (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)); *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 136-137 (1998) (expressing concern about transforming business torts "into treble-damages antitrust cases").

with extended arguments about the reasonableness of such practices. The enforcement agencies also invoke per se rules in civil cases involving unambiguously anticompetitive practices. See, *e.g.*, *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). Decisions applying the per se rule to conduct that not only lacks "predictable and pernicious anticompetitive effect," but may even have substantial "potential for procompetitive benefit," *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997), has the potential to erode the rationale for per se treatment and may foster judicial reluctance to use such a blunt instrument.

2. The United States submits that the Court should grant the petitions for a writ of certiorari and repudiate the court of appeals' unwarranted expansion of the per se rule. Indeed, the decision below is so clearly wrong that the Court may wish to consider summary reversal, rather than plenary review. See *Palmer* v. *BRG of Ga., Inc.*, 498 U.S. 46 (1990) (per curiam); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam).

This Court's decisions leave no doubt that the alleged agreement to unify the prices of Equilon's gasoline brands cannot be per se unlawful under the circumstances presented here. See pp. 7-16, *supra*. The court of appeals assumed that the challenged agreement was entered into as part of the joint venture's formation, but the court's decision is mistaken regardless of the timing of the purported agreement.[20] The Court can correct the court of appeals'

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[20] It is not clear whether the decision to unify prices was made before or after Equilon became operational. See Pet. App. 19a n.11 ("there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands"). Respondents appear to argue the point both ways. Compare Br. in Opp. 11 (petitioners "agreed even before the ventures came into existence to eliminate all competition between their brands of gasoline, including, certainly by implication if not

decision on that basis alone without reaching the alternative bases for reversal.[21]

In any event, the Court should review and correct the court of appeals' decision. Because the court of appeals' opinion can, and likely will, be read to expand very substantially the scope of the per se rule, it poses a threat to the proper enforcement, both private and public, of the antitrust laws. Accordingly, this Court should reaffirm the critical, but carefully limited, role of the per se rule in antitrust cases by granting the petitions and reversing the judgment below.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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expressly, price competition") with *id.* at 12 ("the price-fixing challenged in this action was clearly a decision of Shell and Texaco in their exercise of control over the operations of the venture"). It is also not clear whether the decision was made by Shell and Texaco officials or by Equilon officials. Compare Pet. App. 13a (panel majority) with *id.* at 29a (dissent). As discussed above, however, those questions ultimately have no bearing on the proper outcome of this case. See pp. 8-13, *supra*.

[21] For example, given the court of appeals' premise that the petitioners had agreed to unify prices at the time of Equilon's formation, there is no need for the Court to consider whether a subsequent agreement among the owners of the venture would be subject to Section 1 of the Sherman Act. And because the joint venture itself eliminated all competition between petitioners' downstream operations, and the challenged agreement involved conduct that is clearly integral to the operation of the joint venture and unrelated to the separate activities of the venture's owners, there is no need for the Court to consider the application of the ancillary restraints doctrine. See pp. 12-16, *supra*.

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